Supreme Court, U.S.
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No. 89-589

In The

Supreme Court of the United States

October Term, 1989

CBS INC.,

Petitioner,

vs.

MARTIN W. BERDA and LINDA BERDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. When a prospective employer induces an applicant for employment to accept a position covered by a collective bargaining agreement using false and fraudulent promises and misrepresentations, regardless of the federal concern with collective bargaining agreements, can not the applicant maintain well-established, independent state law actions for breach of contract, promissory estoppel and fraud against the employer.

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COUNTER-STATEMENT OF THE CASE

This action for fraud, promissory estoppel, and breach of contract arises from the misrepresentations of petitioner CBS Inc's employees to Respondents Martin and Linda Berda.[1] Mr. and Mrs. Berda filed suit against CBS in the Court of Common Pleas of Allegheny County, Pennsylvania, and thereafter CBS removed this case to the United States District Court for the Western District of Pennsylvania on the basis of federal question and diversity of citizenship jurisdiction. CBS filed an Answer denying liability and raising pre-emption of state law by the federal labor law as an affirmative defense. Thereafter, CBS moved for Judgment on the Pleadings, or in the alternative, Summary Judgment. After briefing, the District Court (per Hubert I. Teitelbaum, J.) dismissed this action ruling that Plaintiffs' claims were pre-empted by the Labor Management Relations Act, §301, 29 USC §185(a).[2] The Berdas appealed, and the United States Court of Appeals for the Third Circuit reversed the trial court's decision and held that there was no pre-emption

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[1] It is not correct to characterize the claims of Linda Berda as purely for loss of consortium since she also quit her job and agreed to put the family home on sale on the basis of what CBS representatives had told her husband.

[2] The Labor Management Relations Act §301, 29 USC §185(a) provides:

> Suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . .

of Plaintiffs' state law claims by §301 of the Labor Management Relations Act, 29 U.S.C. §185.[3] The Petition by CBS followed.

The facts of this case are quite simple. While still an employee of TV Station WPXI in Pittsburgh, Martin Berda was interviewed for a job at CBS in Washington, D.C. At this pre-employment interview with Emil Franks and M. Lynnwood Heighes, Jr. of CBS, Berda asked about job security and other matters and was told, *inter alia*, that if he accepted the job with CBS, he was guaranteed employment for the reasonably foreseeable future. Relying on CBS's misrepresentations, the Berdas quit their jobs in Pittsburgh, put their house on the market for sale and moved to Washington, D.C. Less than five months after beginning work with CBS, Berda was laid off pursuant to the terms of the collective bargaining agreement as part of a company-wide reduction in force.

REASON FOR REFUSING THE WRIT

Only last year this Court handed down a decision to guide the Circuit and District Courts on the method of determining whether state law claims are pre-empted by §301 of the Labor Management Relations Act: *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 108 S.Ct. 1877 (1988). In the prior year, the Court had handed down another opinion on the same subject in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). These two cases provide

[3] Petitioners did not raise below the applicability of 29 U.S.C. §173(d).

crystal clear guidance on the issue of §301 pre-emption analysis, but they have not yet had an opportunity to work their way through the judicial system.[4] Of the cases relied upon by petitioners to show a conflict in the circuits, all but one case was decided prior to this Court's decision in *Caterpillar* and all of the decisions were decided before *Lingle*. *See*, Petitioner's brief at 12-13. Without directly ruling on the issue of pre-emption of state law claims for pre-employment representations, this Court has already provided the mode of analysis for lower courts to resolve pre-emption difficulties. At this time, no further guidance from the Supreme Court is necessary on this issue.

In *Lingle*, this Court stated,

> [I]f the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted.

486 U.S. at ___, 108 S.Ct. at 1881.

The converse of this proposition is also true. When Plaintiff's claim does not require construction of a collective bargaining agreement, the claim is not pre-empted by federal law. *Id.* at n.4. Thus the determination of whether a claim is pre-empted by §301 turns on a close analysis of the applicable state law. Generally, this Court defers to the Courts of Appeals in construing state law, and a case which turns so much on state law ought not to be

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[4] In the present case, for example, the District Court reached its opinions without reference to *Lingle* which was decided less than ten days before the District Court's Opinion was announced.

reviewed by this Court.[5] Finally, the inability of Petitioners to find a conflict in Circuit Court decisions rendered after *Lingle* suggests two points. First, there is no longer confusion in the lower courts about the correct procedure for §301 pre-emption analysis. Second, there are very few cases in the lower courts dealing with this sort of pre-emption issue. This second conclusion indicates that Circuit and District Courts have had very little opportunity to apply *Lingle*, and that it needs to be construed by the lower courts before a conflict about this law can appear, if one ever will. It also suggests that Petitioner's and amicus's claims of disruption to industrial peace occasioned by the Third Circuit's decision are greatly exaggerated.

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[5] In footnote 18 of its petition, CBS gives some indication of its arguments on the merits. Its first two arguments do not concern the issues now before the Court. They are matters not considered by the District Court and expressly reserved by the Court of Appeals. Finally CBS argues that Berda could never show justifiable reliance on what he was told because the issue requires reference to the collective bargaining agreement. CBS is wrong. Berda will testify that he relied on the statements that he would have a job – never was he referred to any collective bargaining agreement. Under Pennsylvania law, where the means of securing information are not equal, as here, the positive representation of the person who is supposed to possess superior means of information may be relied upon. *Emery v. Third National Bank of Pittsburgh*, 315 Pa. 544, 171 A. 879 (1934); *Siskein v. Cohen*, 363 Pa. 580, 70 A.2d 293 (1950); *Lake v. Thompson*, 366 Pa. 352, 77 A.2d 293 (1951). Moreover, Plaintiffs may justifiably rely on oral representations contrary to writings otherwise available. *Soltan v. Shahboz*, 383 Pa. 474, 119 A.2d 261 (1956); *Arolette v. National Liberty Insurance*, 312 Pa. 442, 167 A. 295 (1933); *Vernon v. Wilson*, 31 Pa.Super 257 (1906).

Although in its opinion the Third Circuit indicated that there is a split of authority on the subject in existing case law among the Circuit Courts, this split of authority has now been resolved by this Court's prior decision in *Lingle*. In the present case, the Third Circuit correctly analyzes the law in light of *Lingle* and *Caterpillar*, and further clarification of this Court's decisions are unnecessary. This Court should not grant certiorari to resolve a conflict in the circuits concerning pre-emption which it has already adequately resolved.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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